

Prevention, Wrongdoing, and the Harm Principle's Breaking Point

Kimberly Kessler Ferzan*

A P SIMESTER AND ANDREAS VON HIRSCH, *CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION* (Hart Publishing 2011)

There are few questions as important as the question of what conduct the state may justly criminalize and punish. Fortunately, theorizing about criminalization is going through a renaissance, as more and more theorists are devoting their efforts towards offering accounts of principles for criminalization.¹ Of course, while this renaissance is occurring, the need for good theorizing is becoming ever more pressing. Not only must we face familiar problems, such as whether drug offenses are justifiably criminalized or what to do about assisted suicide, but we are also part of a paradigm shift toward prevention. Forget the argument that the harm principle collapsed by being co-opted by legal moralism;² now, the harm principle has stretched itself to the breaking point.³

Andrew Simester and Andreas von Hirsch's *Crimes, Harms, and Wrongs* is thus a welcome addition to the growing scholarly discussion. It does not offer a paradigm shift or radical rethinking but instead offers incremental moves in the standard Feinbergian analysis of harm to others, harm to self, offense to others, and harmless wrongdoing categories.⁴ This is a very good book. There are some books that you love to hate, or hate to love, and those books propel and compel you to write and engage with them. This is not one of those books. This is a neat, tidy, and somewhat modest attempt to make some strides in the criminalization debate. And on that score it fully succeeds.

* Laurance S. Rockefeller Visiting Faculty Fellow, Princeton University Center for Human Values. Professor of Law, Rutgers University, School of Law –Camden.

¹ A leading example is DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

² Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 122 (1999).

³ See, e.g., *SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS* (G R Sullivan & Ian Dennis, eds., 2012); Andrew Ashworth, *The Unfairness of Risk-Based Possession Offences*, 5 CRIM. L. AND PHIL. 237 (2011); Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 834 (2001).

⁴ 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984); 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* (1985); 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* (1986); 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1990).

The book is clear and well organized. You can read it in a day or two. And it should translate well into a seminar. Although not every sentence delivers the wit and pith that their fair notice argument does—"Criminal convictions are not like birthday presents. (Surprise!)" (P. 199)—the overall presentation of the arguments exhibits the same level of crystal clear clarity and concision.

In my opinion, the book's greatest drawback is the modesty of its ambitions. I do not think it goes far enough, bites hard enough, or analyzes deeply enough. What I found most wanting was the authors' account of what constitutes wrongdoing. Because they view wrongdoing as a necessary condition for criminalization, it has a significant role to play. The failure to fully elucidate wrongdoing's contours not only denies legislators sufficient real world guidance so as to decide what to criminalize but also prevents the authors from offering sufficient constraints on the preventive state.

This review has two parts. In the first part, I survey the central claims of the book, ultimately concluding with observations about some particularly strong arguments and some points that warranted further analysis. However, because the book has so many discrete arguments that stand and fall independently, it would be impossible for any review to do justice to the intricate analyses presented. I will therefore focus squarely in the second part of my review on a few central matters regarding the harm principle. Specifically, the problems of over-criminalization and prophylactic crimes reveal the ever-extending reach of the preventive state. With respect to these sorts of offenses, I will argue that the authors fail to grapple fully with the difficult issues presented and that a more robust account of their theory of wrongdoing would have greatly assisted their enterprise.

I. AN OVERVIEW

A. *Feinberg 2.0*

The authors' concern is with criminalization, "with the moral question, when should the criminal law be deployed to regulate the behaviour of citizens?" (P. 3.) Simester and von Hirsch require two elements for criminalization. The conduct must be both wrongful and harmful, with harmfulness being broadly construed.

The first part of their book focuses on the rationale for the wrongdoing requirement, though wrongdoing also features into the other sections of the book. Wrongdoing has a central role. One pressing question for criminal law theorists is how something like retributivism—a justification for punishment—relates to the prior act of the state's criminalization of the conduct in the first instance. What, in other words, does desert have to do with what one should not be doing? Simester and von Hirsch nicely chart a path between the two. The authors see criminal law as a regulatory tool with a "distinctively moral voice." (P. 4.) They argue that retributive and preventive goals can be reconciled if we look from an *ex ante* perspective:

[B]y criminalizing the activity of ϕ ing, the state declares that ϕ ing is morally wrongful; it instructs citizens not to ϕ ; it warns them that, if they do ϕ they are liable to be convicted and punished within specified ranges (the levels of which signal the seriousness with which ϕ ing is regarded); and further, the state *undertakes* that on proof of D's ϕ ing, it will impose an appropriate measure of punishment within the specified range, that reflects the blameworthiness of D's conduct. (P. 6.)

Criminal law is used to communicate the wrongfulness of the prohibited conduct. (P. 12.) The hard treatment that accompanies punishment furnishes a prudential reason for citizens to obey the law. (P. 14.) Thus, prevention occurs within a "censuring institution." (P. 15.) Moreover, because the state is censuring the individual, the state should only criminalize those acts that are morally wrong (P. 20), as people have "a moral right not to be falsely censured as criminals." (P. 20.) Indeed, "[n]o other constraint upon justified criminalisation is so fundamental as the requirement that the prohibited conduct be wrongful." (P. 30.)

Wrongfulness is thus a necessary requirement, but it is not sufficient. It needs to be supplemented with harmfulness, as the criminal law must be primarily concerned with actions that affect "the lives of people." (Pp. 21, 29.) Moreover, because the state can create moral reasons by, for example, solving a coordination problem, *mala prohibita* offenses can meet this wrongfulness constraint. (P. 25.)

The second part of the book investigates the harm principle. I will discuss their arguments in depth below, but for now, it is worth noting that their view of the harm principle is quite capacious. The harm principle, despite being a necessary condition for criminalization, requires only "wrongful actions that lead to harm," as opposed to actions that are "harmful in themselves." (P. 52.) This means that actions that potentially have only a tenuous relationship to the harm we wish to prevent are candidates for criminalization. However, for such tenuous linkages to be permissible the eventual harm must be of the sort that were it to follow directly from the conduct, criminalization would be appropriate. (P. 55.) Hence, they criticize John Kaplan's argument that drug use can lead to undermining the work ethic, because "[l]aziness . . . is not itself criminal." (P. 55.)

Still, many harms are remote from the actor's initial conduct. Some harms are mediated by further acts of the defendant or a third party. (P. 58.) Simister and von Hirsch note that the harm principle "assigns no special status to the fact of an intervening choice." (P. 58.) This is the sort of concern that animates something like gun possession, which is only problematic if I use the gun wrongfully or if a third party does. The way to constrain the criminalization of remote harms is wrongfulness. The more remote the actor's conduct from the eventual harm, the harder it is to say that he has acted wrongly vis-à-vis the potential remote event. (Pp. 59–60.) Thus, only when the remote harm may be imputed to the actor has he acted wrongfully. I will discuss this view of imputation, as a matter of normative involvement, below.

Part III discusses the offense principle. Contra Feinberg, the authors contend that offense is not about an affront to an individual's sensibilities. (P. 95.) Rather, to ask someone to desist with "offensive" conduct requires giving reasons beyond the affront. (Pp. 95–96.) These reasons, Simester and von Hirsch argue, are grounded in wrongdoing. They contend that what offenses to others that justify criminalization have in common is that the conduct at issue displays disrespect for others, ranging from insult, to invasion of privacy, to failure to respect boundaries in not being subject to others' intimacies. (Pp. 97–100.) However, only those offenses that are linked to harm are the proper subjects of criminalization. (P. 118.) Nevertheless, Simester and von Hirsch argue that there are two reasons not to collapse the offense principle into the harm principle. First, the wrong inherent in offense is a communicative wrong, whereas there is no particular wrong that is associated with the harms that directly fall within the harm principle. (P. 120.) Second, they argue that the way that harm matters to criminalization is structurally different for offense than for harm. With harm, one points directly to the harm as a reason for criminalization. With offense, one points to offense as a reason to criminalize, then counterarguments to criminalization may be offered (restrictions on liberty, autonomy, expression), and then the harm is offered in rebuttal as a reason to defeat these counterarguments. (P. 120.)

Part IV presents a theoretically nuanced look at paternalism. Indeed, they conclude that the main lesson of this part is "there are no universal answers." (P. 186.) They distinguish between direct paternalism (coercing the person whom you are trying to benefit) and indirect paternalism (coercing one person for the benefit of another). (Pp. 149–52.) The authors are ultimately exceedingly skeptical of directly paternalistic laws. The problem is this: even when acting for the person's own good, by, for example, preventing her suicide attempt, the criminal law is the wrong mechanism. (Pp. 158–59.) A forward-looking mechanism to give her time to reconsider and reflect is warranted, not the condemnatory, backward-looking censure of the criminal law. (Pp. 158–59.) Moreover, even to the extent that this conduct can be deemed "wrong," the justification for intervention cannot be reconciled with punishment, which ignores what is in the actor's best interests, and punishes her instead. (Pp. 159–60.)

The authors then consider two types of indirect paternalism. First, they look at the removal of unwanted options, such as the requirement that all cars have airbags, a regulation that makes it impossible for consumers to buy cars without airbags. (P. 166.) Interestingly, the authors do not condemn such indirectly paternalistic measures outright. Rather, they argue that the concern is cumulative—most importantly, cost. (P. 167.) Driving safe cars is expensive. When the state regulates, it increases the cost and thereby deprives the poor of an option—it is no car or expensive car. They cannot choose a less safe but cheap car. (P. 167.) For this reason, the paternalistic legislation may fail on its own terms, as it does not provide the individuals with what is best for them. (P. 168.) The authors thus counsel "caution, not abstention." (P. 168.) The second form of indirect paternalism that they examine is interference with important choices, such

as killing on request. Here, they consider concerns about imperfect consent and “misalignment,” both of which raise the specter of over inclusiveness as not all consent will be imperfect or misaligned. (Pp. 171–76.)

In Part V entitled, “Drawing Back from Criminal Law,” the authors offer two additional chapters on criminalization questions. Chapter 11 is concerned with mediating considerations. Even if an act implicates harm or offense and is wrong, there may still be reasons not to criminalize it or there may be restrictions on how it is criminalized. Simester and von Hirsch argue that privacy matters, and that the state ought to explore other alternatives to criminalization. (Pp. 193–97.) On the other hand, they reject the principle of *ultima ratio*—that criminal law is a last resort—noting that some crimes ought to be condemned by the criminal law. (P. 198.) Chapter 12 deals with constraining the criminal law, with particular emphasis on “Anti-Social Behavioural Orders,” (“ASBOs”) a problematic mode of social control in Great Britain.

B. A Brief Assessment

There is tremendous analytical clarity to this book. The authors adore distinctions. They are going to distinguish types of harm, types of paternalism, etc. The reader may have to keep a separate sheet of paper by her side for all the distinctions that the authors put into play. That said, the authors are incredibly good at connecting various dots and showing the payoff for clear, rigorous thinking.

Let me give two examples. First, recall that the authors require offenses to cause harm in order to be properly criminalized. What then distinguishes racial insults (which they are willing to criminalize) from “broken windows” theories? For the latter, Simester and von Hirsch contend that the argument that incivilities will lead to further harms disconnects the wrong (embodied in the offensiveness) from the harm (later petty harms). Thus, no criminalization. In contrast, racial insults are instances where where the wrong, the degradation of the victim, leads to a harm intimately linked to that degradation. (Pp. 113–16.)

Second, let us return to ASBOs, which are of considerable concern. The authors’ critique is damning. In addition to the well-traveled roads of requiring culpability, and providing procedural and evidentiary protections (Pp. 212–13), the authors add constraints of “representative authority” and “generality” to the requirements for criminal statutes. (P. 213.) That is, the legislators are the lawmakers with the appropriate jurisdiction for determining what citizens should not do within a democracy, and the laws passed should apply generally. The hitch then is that ASBOs, which they deem a type of “two-step criminalisation,” violate both of these constraints. (Pp. 219–21.) These two-step mechanisms require that if an actor engages in certain types of behavior then a judge proscribes restrictions on the defendant as to what he cannot do and where he cannot go. A violation of the order may be punished with up to five years imprisonment. (P. 213.) Notice this is a judge making a decision about a specific defendant—thus, ASBOs are

examples of improper *criminalization*. Again, the analytical clarity and insight are commendable.

Because the authors are capable of such tremendous rigor, it is noticeable when they do not follow through on their arguments and claims. Sometimes the authors stop too soon to make the sharp points. For example, given the authors' thorough and damning review of directly paternalistic legislation, I was somewhat surprised that they were willing to cut some slack to indirectly paternalistic legislation. Why just "caution?" When the state of New York aims to prevent obesity, not by directly criminalizing drinking too much soda, but indirectly by preventing consumers from buying too much soda to begin with, it seems that consumers ought to have additional grounds, not fewer, for concerns about such legislation. It is true that we delegate to the state many health and safety determinations so that they can determine for us what is healthy to drink, safe to drive, and the like. But why is the better approach to bar Starbucks from selling Frappachinos, instead of providing me with the information that an iced lemon pound cake slice is 490 calories? Undoubtedly, we need principles for when it is permissible for the state to intervene, but the warning trumpet sounded by the authors is insufficient to do the theoretical heavy lifting. Given the fine analytical work they do elsewhere, I wish they had devoted more time to this problem.

Perhaps the biggest question left unanswered is how the authors define wrongdoing. Although one can certainly advance a wrongdoing constraint without articulating a theory of wrongdoing,⁵ I believe that the book would have benefitted from some theorizing as to what the authors take wrongdoing to be. It is clear that they distinguish between wrongdoing and culpability: "The censuring response of the criminal law is appropriate only to culpable wrongdoing, and not on a strict liability basis wherever some unwanted action occurs." (P. 30.) "[I]t can be meaningful to speak of faultless wrongdoing." (P. 31.) But for some offenses, they also take motivations to be constitutive of wrongdoing: "[A]n act of attempted murder is wrongful in virtue of the actor's motivation." (P. 51.) They give other tidbits here and there. Hence, they discuss specific crimes including murder: "Sometimes . . . when considering whether a particular action is wrongful, it seems we should begin with its *harmfulness*. Certain actions, such as murder and vandalism, are wrongs because of the harm they produce: the wrong derives from the harm." (P. 20.) They offer thoughts about blackmail, which, they claim, is not a property offense: "It is D's preparedness to put his victim through that experience—to subjugate V to his will—which is the essence of his wrongdoing." (P. 206.) And then there is the somewhat odd notion of wrongdoing they employ when they concede that self-injury may be wrong: "However, even were we to assume that his conduct violates a moral duty owed by D to himself, a paternalistic

⁵ Compare Victor Tadros' review of Douglas Husak's book. Victor Tadros, *The Architecture of Criminalization*, 28 CRIM. JUST. ETHICS 74, 77 (2009) ("The problem is not that there is no wrongfulness constraint. The problem is rather that without an independent theory of what is wrong, it is difficult to know what is constrained.").

rationale would not warrant the deployment of the criminal law to give public recognition to this 'wrong.'" (P. 158.)

This is one juncture at which I wish the book were more ambitious. The harm principle fails to serve as a sufficient gatekeeper for criminalization. Thus, the authors' desire to articulate what more should be required is important. And, it certainly sets the agenda for future theorists. Nevertheless, there is considerable distance between this book and the drafting table. What is needed is a theory of wrongdoing that will constrain legislators. That is not on offer and that is no small task.⁶ Moreover, as will be seen below, a further exploration of wrongdoing is necessary to cabin the harm principle.

II. PREVENTION AND THE LIMITS OF CRIMINALIZATION

As Bernard Harcourt noted years ago, the harm principle, a once-believed robust necessary condition for criminalization, has collapsed.⁷ Harcourt's argument was that the harm principle was co-opted by legal moralism. But the problem now seems to be that the harm principle has been stretched to the breaking point even with respect to fear of harm itself. Many acts risk future harm by the actor or by others, and thus, we need further principles to restrain the state.⁸ I wish to return to two of the puzzles presented in Simester and von Hirsch's harm principle chapter: over inclusive crimes and prophylactic offenses. Although the authors do an exceptional job of conceptual ground clearing, there is still too much left undone.

A. Over Inclusiveness

The criminal law often adopts rules, rather than standards, so as to give citizens better notice of what conduct is prohibited.⁹ Rather than telling citizens to "drive safely," it forbids driving over 55 mph. Rather than telling citizens that they may only have sex with competent individuals, it forbids sexual intercourse with

⁶ The authors acknowledge that even as to types of wrongdoing, they do not articulate "handily-useable criteria" but only "guides for the direction of argument." (P. 32.)

⁷ Harcourt, *supra* note 2, at 113 ("The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate.").

⁸ See *id.* at 182: "The harm principle is silent in the sense that it does not determine whether a non-trivial harm justified restrictions on liberty, nor does it determine how to compare or weigh competing claims of harms. It was never intended to be a *sufficient* condition. It does not address the comparative importance of harms. Joel Feinberg's thorough discussion of the harm principle recognized this important fact." See also *id.* at 186–87 (discussing the ways that Mill, Hart, and Feinberg sought to use other normative values to give the harm principle the critical edge).

⁹ These rules, however, are more standard-like than they first appear. LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, WITH STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 292–295 (2009).

children under sixteen. As Larry Alexander and Emily Sherwin have argued, “a rule is a posited norm that fulfills the function of posited norms, that is, that settles questions of what ought to be done.”¹⁰

One problem with rules is that they are over inclusive. The rule may apply even when the underlying justification does not. Sometimes it is safe to drive over 55; sometimes sixteen-year-olds can meaningfully consent. When the rule applies, but its justification does not, there is a gap. And, as Alexander and Sherwin have argued, this gap cannot be closed.¹¹

Are individuals who fall within the gap obligated to obey the law? Why, in other words, is it wrong for the person within the gap, to disregard the law *when, without the law, she would not be acting wrongfully*? Why must Mario Andretti drive 55? Simester and von Hirsch offer several reasons why the actor caught within the web of an over inclusive endangerment statute is still obligated to obey it. They note first the practical necessity of such legislation, as the legislature must choose between over inclusive legislation and under criminalization. (P. 77.) They also note that such a statute is valuable because individuals are likely to make mistakes when trying to calculate the safe driving conditions themselves. (P. 77.) Additionally, they note that there are obligations of cooperation – all drivers benefit from such rules. (P. 78.) Therefore, such drivers are selfish if they think they can unilaterally opt out of such rules. (P. 78.) Finally, they argue that because all drivers rely on other drivers following the rules, it is no longer safe for the driver to travel at 80 mph. (P. 79.)

I remain unpersuaded that citizens who fall within the gap simply have an obligation to obey the law. I think things are far more complicated. But let us start by considering each of the authors’ arguments. The first is practical necessity—we will either over criminalize or under criminalize. Yet, this hardly seems to be a reason to over criminalize. We would also punish more guilty people with a lower burden of proof. But that simply is to punish the innocent in order to capture the guilty. I would think the authors would need some sort of argument that even those who are seemingly caught within the web of over inclusion benefit from such legislation. None is on offer.

Moreover, even more charitably construed, this argument follows in the footsteps of Doug Husak’s argument for why we will sometimes have over inclusive crimes, an argument about which Larry Alexander and I have already raised doubts.¹² Husak argues that the reason we need over inclusive legislation that covers not only those individuals *who do not know* they can safely cross the highway median but also those individuals *who do know* they can safely cross is because, “[w]e simply have no reliable method to distinguish epistemically privileged from epistemically fortunate drivers who cross the median line of a

¹⁰ LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 30 (2001).

¹¹ *Id.* at 54.

¹² See ALEXANDER & FERZAN, *supra* note 9, at 300 n.120.

curved highway. To reduce the number of crashes—a substantial state objective—we have little alternative but to draft a statute that punishes both classes of persons.”¹³

But to say that we cannot draft such a statute is not to say that we are then authorized to punish those caught within the over inclusive web. Certainly, there is a long road between *ex ante* criminalization and *ex post* punishment. Is there not some point at which the state can assess who was epistemically privileged and free them from criminal law’s reach? Indeed, Simester and von Hirsch explicitly note that the “criminal law tends to prohibit actions on the basis of their typical risks and consequences, leaving further refinement, if any, to the realm of exceptions.” (P. 46.) So, why think criminalization is all or nothing? Don’t we need to talk about exceptions or other alternatives? In other words, I have yet to see the evidence of practical necessity.

Simester and von Hirsch’s second argument is that rules serve valuable functions because citizens are likely to get the calculations wrong. Indeed, this is true. I can’t think of a defendant who is more poorly situated to determine whether an attractive, fifteen-year-old girl is competent to consent than the man who wants to have sex with her. Still, it strikes me as a mistake to think that the only way that the state can provide guidance is by punishing actors *even in those instances in which they correctly calculate and do not make a mistake*.¹⁴

The third argument is that actors who ignore laws are selfish because they think the laws do not apply to them. But this begs the question. The question is why the law should apply to them. Moreover, despite their earlier dismissal of Antony Duff’s argument that citizens who violate *malum prohibitum* offenses manifest civic arrogance and that is the wrong they commit (P. 26),¹⁵ at this point,

¹³ HUSAK, *supra* note 1, at 155.

¹⁴ Accord R A Duff, *Crime, Prohibition, and Punishment*, 19 J. APPLIED PHIL. 97, 103 (2002).

¹⁵ *Id.* at 104.

He claims that he can trust himself, and that we should therefore trust him, to make such judgements; but he has no adequate basis for that claim. He might know that his conduct is safe—that it does not endanger the relevant interests: but he does not *know* that he knows this, and therefore cannot justifiably claim to be sure that he is not endangering any such interest. So even if his action does not in fact endanger any such interest, he takes an unjustified risk that it will do so; and he arrogantly claims the right to decide for himself on matters which he, like the rest of us, should not trust himself to decide. His claim is arrogant because it is unjustified—but also because it seeks to set him above his fellow citizens, in matters which affect their legally protected interests; and that is what merits the censure of the criminal law.

There are a few problems with Duff’s theory. First, consider his claim that a defendant cannot “know he knows.” Although it may be true that in general the reason we give the law authority to decide something for us is because legislators may be in epistemically superior positions, this certainly cannot always be true. Of course, he can know he knows. (Indeed, Duff recognizes this in later work. See R A DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* 170 (2007)). He can be an expert diver who knows that a “no diving here” sign cannot apply to him. He can be a seventeen-year-old who has been in a long-term, committed relationship with his fifteen-

the authors tread dangerously close to making the same argument. Although the authors do not fully endorse that selfishness explains the defendant's wrongdoing, it remains troubling in that whatever the wrong of "selfishness" is, it cannot possibly be punished as the very same offense that the legislators meant to target.

The author's final argument, and the one on which they principally rely, is that by violating the standard of behavior, the defector from over inclusive legislation makes life dangerous for others. But there are some problems with this as well. First, the argument only applies to items like driving. In other instances—for example, age of consent—one actor's deviation from the rule does not make sex dangerous for everyone else. Second, even if defection is dangerous, what is the proportional punishment? One might imagine that the defection is minimally dangerous (the driver can see for miles and knows it is safe to drive 100 mph) or exceedingly dangerous (the driver's weaving through traffic causes other drivers to drive far more defensively, distracts them, and the like). Therefore, it would be appropriate to punish this risk, not the failure to drive the speed limit itself.

If one takes seriously the notion that the criminal law can only proscribe and can only punish those who deserve it, then we must be ready to confront more directly the problems presented by over inclusive criminal laws. The simple fact may be that even if we can justify the *legislation* as the best we can do, we cannot justify the *punishment* in the face of a known case of over inclusivity. What should we do then? We should ask whether when the actor commits an offense that is over inclusive as to him, he does impose an unjustifiable risk—the unjustifiable risk that his defection will undermine the rule of law. In other words, the man who runs the red light at high noon, with not a person in sight, does no wrong and should commit no offense. But the driver who decides that he can drive 100 mph around other cars does undermine the speed limit for everyone *even when it is true that he can safely drive*. Of course, whether we truly want to open the door to a crime of "undermining of rule of law values" is itself a separate question, but that is the question that authors need the courage to address.¹⁶

year-old girlfriend since third grade. He can be a sports car driver facing stretches of empty and rarely traveled road. He might even be an average Joe, sitting at high noon at a stop light when he can see for miles in every direction, and there is not a car to be found. So, the claim that he lacks the epistemic warrant cannot be true in these cases. Second, the claim of arrogance is also problematic. Is arrogance part of a culpable act, or is it merely a bad character state? More importantly, the manifestation of civic arrogance is not the crime with which he is being charged. So, what about civic arrogance justifies responsibility for unauthorized diving, statutory rape, speeding, or running a red light? Even Duff's later refinements, offering that we owe each other a duty of assurance and that to deny law's application to us is a denial of civil fellowship, *id.* at 170–71, still fail to connect these duties and denials to the appropriate and proportional criminal sanction.

¹⁶ See ALEXANDER & FERZAN, *supra* note 9, at 311–13 (advocating the "rule of law" as an independent legally protected interest).

B. Prophylactic Crimes

Prophylactic crimes are, according to the authors, of the type that original actor S engages in conduct σ where later intervention ϕ by S or another person P is necessary to cause the harm. (P. 79.) Possession of burglar's tools is such an offense. Prophylactic offenses are in some senses superior to complicity, claim the authors, because they give better guidance and notice, and may more fairly label S's conduct. (P. 80.) However, a probability between σ and harm is not itself sufficient to justify criminalizing σ because "[i]n any liberal conception of the state, people have a fundamental right to be treated as separate individuals, as autonomous moral agents who are distinctively responsible for the consequences of their *own* actions." (Pp. 80–81, 85.)

Considering first the instances in which the actor's conduct is linked to another's wrongdoing, the critical inquiry according to Simester and von Hirsch is imputation. Their analysis is as follows. They begin with the "Standard Harms Analysis":

Step 1: Consider the gravity of the eventual harm, and its likelihood. The greater the gravity and likelihood, the stronger the case for criminalisation.

Step 2: Weigh against the foregoing, the social value of the conduct, and the degree of intrusion upon actors' choices that criminalisation would involve. The more valuable the conduct is, or the more the prohibition would limit liberty, the stronger the countervailing case would be.

Step 3: Observe certain side-constraints that would preclude criminalisation. The prohibition should not, for example, infringe rights of privacy or free expression. (P. 55.)

Simester and von Hirsch argue that the problem with this analysis is that liberty is just a weighing factor and that the Standard Harms Analysis does not provide any sense of the weight to be given. (P. 56.) Accordingly, they advocate for an "Extended Harms Analysis." (P. 56.) When harms are remote, meaning they involve certain kinds of contingencies (P. 57), then the problem becomes wrongfulness. How can the potential creation of such an attenuated harm be wrong?¹⁷

The answer, they claim, is to look for imputation. They use the term "imputation" in much the same way that Duff uses "prospective responsibility," that is, the question of what is one's business. (P. 63.)¹⁸ What imputation adds,

¹⁷ "Criminalising the conduct thus raises the question: why is my conduct wrongful?" (P. 60.)

¹⁸ DUFF, ANSWERING, *supra* note 15, at 34–36.

that the Standard Harms Analysis lacks, is an argument of principle, as opposed to a factor to be weighed. (Pp. 66–67.)

“Extended Harm Analysis” is something of a misnomer. It is not that the authors are adding something to the harm analysis, such that the harm analysis is itself being extended. Rather, the authors are adding an independent criterion of wrongdoing, through their doctrine of imputation.

Although imputation admits of no precise formulation, the key, they claim, is to look for “normative involvement.” Advocating criminal conduct counts, as does supplying advice. (Pp. 81–81, 85), but merely engaging in conduct that others may imitate does not. (Pp. 82–83.) Where products are involved, the authors propose a “core function” test. (P. 83.) Cars have legitimate uses, but military flamethrowers do not. (Pp. 83–84.) When an individual supplies something, this act has “expressive meaning as a facilitation of its use.” (P. 84.) In borderline cases, the legislature should not rely on the core function, but should additionally require that the actor intend the tool to be used for criminal purposes. (P. 85.)

There is also the problem of what to do when the actor’s conduct will affect his own later behavior. They note that:

When harmless conduct is proscribed merely because the actor, if she perpetrates it, may then be tempted to commit further acts that are harmful, she is being treated as one might a child: as someone who lacks the insight or self-control to resist the later temptation. Assuming she is a competent actor, such treatment would fail to respect her as a moral agent, capable of deliberation and self-control. (P. 62.)

Thus, the concerns with prophylactic offenses differ depending upon who the later intervening actor is. The concern that underlies early preparatory crimes is autonomy, that we cannot treat an individual as a child. (P. 81.) We cannot prevent him from engaging in nonharmful conduct because we believe he will choose unwisely in the future. In contrast, the worry with respect to later conduct by third parties is that “people have a fundamental right to be treated as separate individuals, as autonomous moral agents who are distinctively responsible for the consequences of their *own* actions. (P. 81.)

These raise different sorts of issues, and so, the authors ought to have separated their analyses more cleanly. I will focus now on how the actor’s current conduct affects his own later wrongdoing and then will return in the next section to when the actor influences the wrongdoing of others.

1. Preventing the Actor’s Own Conduct

Consider the types of normative involvement that the authors claim allow for imputation: advocating, providing products with a core function of causing harm, and assisting or advising. (Pp. 81–85.) This means that if Alex advocates that Betty kill Carl, Alex gives Betty a military flamethrower, or Alex supplies advice

on the best ways to poison someone, then Alex is sufficiently normatively involved with Betty's choices that it is possible to constrain Alex's behavior.

But what if Alex is engaging in conduct that may further a later crime by Alex? Although I believe the authors have a position on this, it is not quite as clear as one would have hoped. Moreover, I do not believe their answer fully responds to the problem they raise.

Let us take a separate hypothetical. Assume that Bob wants to kill someone and forms the intention to do so. What would prevent criminalizing the formation of such an intention? Is it that forming the intention is not a wrong? Simester and von Hirsch might say that there is a wrong here. With respect to endangerment offenses they claim, "[i]t may be unreasonable for an actor to run a risk," and second, "the risky conduct can be a wrong when it is done *in order* to harm another." (P. 75.) They then claim that incomplete attempts fit within the latter category, and that the problem with punishing such attempts is not *wrongfulness* but *harmfulness*: "the ultimate harm may be too remote, too dependent on contingencies, for state intervention so intrusive as the criminal law to be justified." (P. 76.)

Now, maybe they will say that forming the intention itself is not risky conduct and so there is no wrong. So, let us go one step further. Bob now buys burglar's tools to break into the victim's home. Here, it looks like they would say that there is a wrong, but the harm may be too remote. I think that on their view, that will ultimately be a question for the Standard Harms Analysis.

Imagine that the state decides that rather than deal with all those Bobs in the world, they will just flat out ban possessing burglar's tools, irrespective of the actor's intention. The problem becomes that the wrong upon which the authors would otherwise rely, the intention accompanying the possession, has disappeared. So now, the wrong has to come from somewhere else, either the later harm or from the formation of the later intention. But at this point, say the authors, both of these are unacceptable links because the state is essentially speculating. It is telling Bob, "We don't trust you with crowbars because of what you might choose to do later."

But now the question. Why does the concern, that the state is treating its citizens like children who lack insight and self-control (p. 81), only have force as applied to the possession charge and not as applied to the possession with intent charge? Does not any criminalization prior to Bob's unleashing a risk of harm still treat him as someone who lacks insight and self-control? This isn't a problem of balancing within the Standard Harms Analysis. And, extending the harms analysis is not going to solve the problem. The problem is one of how the authors' account of wrongdoing squares with these concerns about autonomy. We need to know more about wrongs to know whether autonomy trumps the creation of early preparatory offenses.¹⁹

¹⁹ Cf. Ashworth, *supra* note 3, at 246:

There are good reasons for criminal lawyers to agonise over these issues, reasons that relate to respect for an individual's liberty and autonomy. Simply doing *any* overt act with the required intention should be insufficient for criminal liability: this would reduce

Recall as well that intentions are not the only potential wrong-making features. Simester and von Hirsch also think that one can be wrong for running an unreasonable risk. Here, too, it is not clear what the authors plan to do. After all, the entire idea of imputation was that it was not a weighing factor in the Standard Harms Analysis. But they don't give us any guidance, as a question of wrongdoing, as to how to determine if Bob is taking an unreasonable risk.

To my mind, the argument against treating a defendant like a child has more force than the authors seem to give it. As Larry Alexander and I have argued (more than once!), punishing Bob prior to his unleashing a risk of harm to others is problematic precisely because it punishes him based on a prediction of his future wrongdoing and not based on any risk of harm that he imposes on others.²⁰ As long as he can, through the exercise of reason and will alone, simply decide not to cause the harm, then punishing him seems problematic, precisely because the basis for punishing him is a prediction of what he may do in the future.

On the other hand, I would not go so far as to say that the state should have no interest in Bob (nor would Alexander).²¹ Rather, the question of whether a liberal state ought to punish Bob, saying "You may not possess burglar's tools with the intent to later use them" is distinct from the question of whether a liberal state may say, "If you intend to commit an offense and you engage in an act in furtherance of it, then we will stop you." That is, the very rationale behind self-defense is that the aggressor has engaged in an action that permits the defender to predict that harm will occur and to act based on that prediction. The rationale isn't that Bob does not have control over his future choices, but rather, that having presented himself as a culpable aggressor at that moment, Bob lacks standing to complain if others take that present intention seriously and try to stop him.

2. When Others May Do Wrong

As discussed above, Simester and von Hirsch maintain that beyond causally contributing to another's potential wrongdoing, one must be normatively involved. Normative involvement may be found in advocating, providing instrumentalities lacking legitimate purposes, assisting, and advising. I think that the authors take

liberty by requiring us to forego options that may be valuable to us and which may well be harmless, would condemn people even though perpetration of the wrong of the substantive offence remains subject to various contingencies, would deny people the opportunity to change their mind (whether through repentance or failure of courage) before taking a decisive step towards causing harm, and would also risk arbitrariness by giving the police considerable power over individuals. To convict of an attempt should require both a proximate act and a high level of culpability and commitment.

²⁰ Our most recent foray is Larry Alexander & Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. CRIM. L. 637 (2012).

²¹ See *id.*; see also Kimberly Kessler Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide*, 48 SAN DIEGO L. REV. 1273 (2011).

too narrow a position on when one person may be responsible for another's conduct.

It is worth taking a step back and looking at the existing framework. The criminal law evades this question with doctrines that actually proceed in opposite directions. On the one hand, criminal law doctrines on solicitation and complicity (and attempt) require purpose. This means that there is no criminal liability for the actor who provides the address of a known drug dealer or hands a knife to another prison inmate, even when both actors know they are facilitating criminal acts and are providing substantial assistance.²² The fear here seems to be that we become our brothers' keepers. However, rather than spending any effort sorting out the question of when we ought to be at liberty not to inquire further and when we ought to be responsible for others' acts, the criminal law draws a bright line at purpose.

On the other hand, criminalization decisions sometimes implicitly rely on the potential wrongdoing of others to justify criminal laws. For instance, if I am a well-trained gun owner who lives alone and is not around children, then a law that restricts my gun ownership is a law that prevents me from doing a justifiable act because others might do wrong (say, by stealing my gun). Similarly, the criminalization of drugs on the basis that some actors will do wrong restricts the liberty of others who will not. Our liberty is thus restricted by the potential wrongdoing of others. But the criminal law's method of restricting our actions because of others' potential wrongdoing is opaque to us, as it does not operate through the doctrine of complicity.

The law also has offenses that are compromises between complicity and prophylactic criminalization. For instance, crimes like "substantial facilitation" are enacted when we believe that complicity fails to fully capture all culpable actors. After all, why in *Fountain* when the defendant furnishes a shiv with which the principal intends to stab a prison guard, should the defendant be freed from accountability because he only knew, but did not intend, that the principal kill the guard?

All of these crimes are of a piece. Each relates to the question of the responsibility we have for the potential wrongdoing of others. Elsewhere, Larry Alexander and I have argued for a unified conception of criminal law based upon consciously unleashing a risk of unjustified harm to another's legally protected interest.²³ While some theorists will reject such a thesis on fair labeling grounds (including Simester and von Hirsch), I think this is a perspicuous way of thinking about this puzzle. If you want to put the pieces together into special part crimes

²² United States v. Fountain, 768 F.2d 790 (7th Cir. 1985); State v. Gladstone, 474 P.2d 274 (Wash. 1970).

²³ See generally ALEXANDER & FERZAN, *supra* note 9.

when I am done, have at it. But we all face the same puzzle—when can one person be held accountable for what someone else might do?²⁴

The problem with the Simester and von Hirsch approach is that though their forms of normative involvement may be sufficient, it remains to be seen whether they are necessary. After all, our fascination with purpose is merely superficial, given that prophylactic offenses currently require no *mens rea* as to the crime whatsoever. More importantly, why should we care only about cases of purpose? Should not the inquiry be whether the conduct one engages in is unjustifiable? That is, if I know I am leaving out something that can be used as a weapon, or I know that someone may construe my words as encouraging, and I lack any good reason for my conduct, then why am I off the hook?

It is not enough to say that normative involvement provides a wrongmaking feature. Rather, what needs to be established is that only these sorts of normative involvement have that feature. But it is hard to see why this is so. As Michael Moore notes: “There is no moral privilege to dress an attractive woman in provocative garb when I know rapists will find her in isolated situations; no privilege to send a jogger across Central Park at night to buy me a pack of cigarettes; no privilege to stack *your* flax too close to the tracks of a railroad I know to have inadequate spark arrestors.”²⁵ And Andrew Cornford asks, why must we be on the lookout for other events in the world, but not the events that are another’s action?²⁶ Elsewhere, I have argued that when provocateurs forfeit their defensive rights is a question of the unjustifiability of the action, which will be context specific.²⁷

What is needed, and I cannot provide a full account here, is how to account for when one imposes an unjustifiable risk and under what conditions we are permitted to exclude certain considerations from the calculation or what sorts of interests will always weigh heavily in a calculation. Hence, even if we can agree with Simester and von Hirsch that we will ultimately have to make a normative

²⁴ Alexander and I leave this unanswered, as keenly noticed and criticized by Duff. RA Duff, *Risks, Culpability and Criminal Liability*, in *SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS* 121, 130–31 (G R Sullivan & Ian Dennis, eds., 2012) (“The intended murder weapon, the forged financial statement with which I intend to defraud, the information about bomb-making that I intend to use: all are dangerous in ways I cannot completely control, and my bad reasons for possessing such items cannot justify creating those risks.”).

²⁵ MICHAEL S MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* 293 (2009); see also Andrew Cornford, *Indirect Crimes*, *LAW & PHIL* (forthcoming 2013) (on file with author), available at http://download.springer.com/static/pdf/542/art%253A10.1007%252Fs10982-012-9148-z.pdf?auth66=1362370305_4728240f13ee35a849cca47c0150eb38&text=.pdf (“It would surely be strange if morality generally permitted agents like D to impose risk of this sort as a side-effect of making a profit, simply because the risk concerned takes the form of an intervening action.”).

²⁶ See *id.* (“[W]hy is it only wrong culpably to cause or risk harm to others in the absence of intervening action, even though such actions are materially like other events?”).

²⁷ Kimberly Kessler Ferzan, *Provocateurs*, *CRIM. L. & PHIL.* (forthcoming 2013), available at <http://ssrn.com/abstract=2028102>.

determination as to the scope of imputability, that inquiry ought to be understood as the question of when the risks we pose are unjustified. I, of course, have only relocated the question; I have not solved it. But this is where the inquiry is located. The relocation helps us to see precisely how liberty interests and speech interests are going to collide with potential victims' interests in not being harmed. Moreover, because Simester and von Hirsch take "unreasonable risk creation" as a potential wrong-making feature, they cannot just sidestep the scuffle with talk of an "Extended Harms Analysis" because the Extended Harms Analysis, which asks about wrongdoing, simply reintroduces the very same "unreasonable risk" calculation.

III. CONCLUSION

Crimes, Harms, and Wrongs supplies additional pieces to the puzzle of criminalization. It warrants a spot on every bookshelf, and it is necessary reading for criminal law theorists. Ultimately, however, the authors' principles of criminalization require grappling with wrongdoing. A capacious harm principle and an undefined notion of wrongdoing cannot serve to cabin the preventive state. Simester and von Hirsch accurately dissect a pressing problem. Now, it is time to address it.

